

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE DRAIN,

Defendant-Appellant.

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UNPUBLISHED

January 6, 2005

No. 224539

Macomb Circuit Court

LC No. 99-017293-FC

ON SECOND REMAND

Before: Fitzgerald, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

On February 1, 2002, we issued an opinion affirming defendant's convictions of safe breaking, MCL 750.531(B) and first-degree home invasion, MCL 750.110a(2). We also affirmed defendant's sentences as an habitual offender, third offense, MCL 769.11, of twenty to forty years for the safe breaking conviction and ten to thirty years for the home invasion conviction. On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's February 1, 2002, opinion and remanded for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 213 (2003). In an opinion dated January 20, 2004, we again affirmed the sentence imposed, stating:

In our previous opinion, we concluded that, "The factors identified by the trial court are objective and verifiable and therefore appropriate. . . . We find no abuse of discretion in the trial court's findings that these factors were not adequately considered in the scoring of the guidelines and constitute substantial and compelling reasons to depart from the statutory minimum sentence." Applying the relevant portions of the framework laid out in *Babcock III*, *supra* at 272-274, we again reach the same conclusion.

In an order dated December 10, 2004, the Michigan Supreme Court (Weaver, J., dissenting) vacated this Court's January 10, 2004, opinion, and once again remanded for this Court "to provide a more thorough analysis and conclusion pursuant to the guidelines set forth in *Babcock*."

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not base a departure on an offense characteristic or offender characteristic already considered in

determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. *Id.* Factors meriting departure must be objective and verifiable, must keenly attract and irresistibly hold the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 264. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Id.* at 258-259. If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *Id.* at 260.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error and the determination that the factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* at 264-265; *Abramski, supra* at 74. The determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion and the extent of the departure is reviewed for an abuse of discretion. *Id.* In terms of sentencing departure review, "[a]n abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The trial court departed from the guidelines range of forty-three to 129 months for the safe breaking conviction and sentenced defendant to a minimum term of twenty years and articulated the reasons for the departure:

I don't think the guidelines adequately consider the impact that it [the criminal activity] had on the these particular victims, the mode of hitting homes at random in the countryside, the fact of the other stolen objects that the police came upon as they were investigating this case indicating a long course of continuing activity. I don't think they adequately contemplated the extensive juvenile history . . . And then, of course, starting with the armed robbery, the attempted breaking and entering and the carrying of a concealed weapon leading up the events of this particular incident . . . I don't believe that the guidelines adequately contemplate the great depth and extent of criminal activity involved by the defendant and his friends, and so it's for these reasons and for the protection of society that I have exceeded the guidelines.

Thus, the trial court exceeded the guidelines for three reasons: The guidelines failed to adequately consider the impact of the methodology of the crime on the particular victims, defendant's extensive juvenile record, and his pattern of continuing criminal activity.

The psychological impact of the crime on the victims is taken into account in the scoring of Offense Variable 4. Although the trial court found that defendant's "mode of hitting homes at random in the countryside" had an impact on the victims that is not adequately considered in the scoring of the guidelines, the record reflects that the victims did not give a victim's impact statement. Further, the trial court did not articulate how this characteristic was given inadequate weight by the guidelines scoring. As our Supreme Court reiterated in *Babcock*, the trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds ... that the characteristic has been given inadequate or disproportionate weight." *Babcock, supra* at 258 n 12, quoting MCL 769.34(3)(b).<sup>1</sup>

Similarly, the remaining two factors cited, defendant's extensive juvenile criminal history and his pattern of continuing criminal activity, were taken into account in the scoring of Prior Record Variables 4 and 5 and OV 13, and the trial court did not articulate how these factors were given inadequate weight by the sentencing guidelines. Under these circumstances, the appropriate remedy is to remand to the trial court for resentencing or rearticulation of the court's reasons for the departure.

Remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>1</sup> Additionally, that the random nature of choosing victims may produce fear in potential victims is a subjective factor that cannot support a departure. MCL 769.4(3)(b).